BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA

IN THE MATTER OF:	)	
	)	
APPLICATION FOR CERTIFICATION OF THE	)	**DOCKET NO. 01-AFC-21**
TESLA POWER PROJECT	)	**CERTIFIED JUNE 16, 2004**
BY MIDWAY POWER LLC, A SUBSIDIARY	)	
OF FLORIDA POWER AND LIGHT	)	**ORDER NO. 04-0811-02**
	)	

ORDER DENYING INTERVENORS' PETITIONS FOR RECONSIDERATION

Introduction and Summary

At a public hearing on June 16, 2004, the Energy Commission approved the Application for Certification ("AFC") for the Tesla Power Project, a 1,120-megawatt power plant proposed for construction in eastern Alameda County near the border of San Joaquin County and the City of Tracy. Any party to a power facility certification proceeding may file a petition for reconsideration with the Commission. (Cal. Code Regs., tit. 20, §§ 1712, subd. (b), 1720; see also Pub. Resources Code, § 25530.) Timely petitions for reconsideration were filed by intervenors Robert Sarvey ("Sarvey") and Californians for Renewable Energy ("CARE").[1] Responses in opposition were filed by the Applicant (Midway Power, LLC, a subsidiary of Florida Power and Light) and the Commission Staff. We considered the Sarvey and CARE petitions at our regularly-scheduled, public Business Meeting on August 11, 2004, at which all parties had an opportunity to present argument.

Petitions for reconsideration must "set forth with specificity . . . any error in fact or law." (Cal. Code Regs., tit. 20, § 1720, subd.(c).) The Sarvey and CARE petitions raise a procedural point and several interrelated substantive issues, most of which deal with air quality matters. The petitions do little more than re-argue evidentiary matters that have already been discussed in

[1] CARE's Petition is titled "Request for Reconsideration of [CARE]." CARE also filed an "Errata to Request for Reconsideration of [CARE]." We treat both documents as one consolidated petition for reconsideration. We also note that CARE's petition consists largely of responses to a Staff document titled "Commission Staff's Response to Intervenor Sarvey's Motion to Delay Certification and Comments on Revised PMPD" ("Staff Response"), which we struck from the record at the June 16, 2004, hearing. (RT 06/16/04, p. 61.) Although technically CARE's responses are inappropriate, because they apply to a document that is no longer officially part of the record, we discuss them here because for the most part they deal with air quality issues that are also raised by Mr. Sarvey.

exhausting detail and that are resolved in our June 16, 2004, Decision. Having considered the petitions, the arguments presented on August 11, 2004, and the entire record of the proceeding, we find no error of fact or law in that Decision. Therefore, in this Order, after discussing each one of the points raised in the petitions, we deny reconsideration.

1. Mr. Sarvey's Data Request on Cumulative Air Quality Impacts

Mr. Sarvey's Petition asserts that the Commission erred by not formally responding to his request for an order compelling the Staff to respond to a data request. There is no reason to change the Decision in this regard, because the matter at issue was not actually a data request to which Mr. Sarvey was legally entitled to a response; rather, it was essentially a quarrel with the method that Staff used to analyze cumulative air quality impacts. Moreover, even if Mr. Sarvey's method had been used, the end result, in terms of required air quality mitigation, would have been unchanged. Finally, Mr. Sarvey's request for an order, while not formally responded to, was de facto denied. We discuss each of these points in turn.

Mr. Sarvey's data request to the Staff asked for a "Comprehensive Qualitative Cumulative Air Analysis for the Tesla Power Project including stationary and mobile sources for all reasonably foreseeable projects within the project area." (Exhibit 81, p. 2.) Staff responded that its analysis:

> . . . addresses the impact of the project along with other reasonably foreseeable future projects in the area. The applicant, in conjunction with the Energy Commission staff [and in] consultation with the BAAQMD [Bay Area Air Quality Management District, the air quality permitting agency for the project], SJVAPCD [San Joaquin Valley Air Pollution Control District, which has responsibility for air quality in the region most affected by the project] and/or the City of Tracy and San Joaquin County, the applicant identified a number of nearby sources that are either proposed, under construction, or otherwise cumulatively notable. . . . . [¶] The land use developments also involve future mobile sources. . . . . Emission forecasts published by CARB [California Air Resources Board] indicate mobile source emissions in San Joaquin County will continue to decline between now and 2020 as a result of state and federal vehicle emissions control programs already in place. Because these emissions will decline . . . they are adequately represented in the model within the present background conditions. (Exhibit 56.)

Exhibit 56 also contained a summary of the Staff's cumulative air quality analysis, which was explained in great detail in its Preliminary and Final Staff Assessments. The final assessment was presented at the evidentiary hearings and was subject to extensive cross-examination and debate – from, among others, Mr. Sarvey. (See RT 9/18/03, pp. 368-371; RT 4/8/04, pp. 146-148, 151-153, 176-178, 185.)

Mr. Sarvey, however, filed a "Petition for Order Directing Response to Intervenor's Data Request" ("Motion to Compel") (Exhibit 82) and in it stated that:

> Intervenor disputes CEC staff's assertion that mobile source from future reasonably foreseeable projects should be included as background concentrations. . . . Intervenor contends project areas [sic] PM-10 and ozone levels are rising and the project area is in nonattainment and [the Tesla Project] is now proposing to use credits that were issued in 1984 to offset the projects [sic] emissions. (Exhibit 82.)

Mr. Sarvey's Motion to Compel demonstrates that his quarrel is not that the Staff did not respond to his data request, but rather that the Staff used different assumptions and a different methodology than the ones he would prefer. By providing its response, the Staff fully complied with our regulations on data requests, which provide, among other things, that "[a]ny party may request from a party other than the applicant information *which is reasonably available to the responding party* . . . ." (Cal. Code Regs., tit. 20, § 1716, subd. (d) (emphasis added).) The regulations thus require parties to provide information *that they possess*; the regulations do not require parties to perform new or different analyses at the whim of other parties. (Our regulations do require the Staff to perform assessments of many issues (see *id.* §§ 1742-1744, 1747); however, having performed those assessments and any others directed by the Committee's Presiding Member, the Staff has no further analytic obligations.)

Our Decision on the Tesla Project discusses the analytic disputes between Mr. Sarvey and the Staff on the cumulative air quality analysis and resolves the disputes in the Staff's favor. (Decision, pp. 162-164.) The Decision also finds that the Tesla project will contribute to a cumulative air quality impact, and it therefore includes Air Quality Condition AQ-C7, which "specifically provides mitigation to reduce Project-related direct *and cumulative impacts to insignificant levels* in the San Joaquin Valley." (*Id.*, Finding 37, p. 168.) Thus, as the Staff noted in its original response to Mr. Sarvey's data request, "[r]egardless of any projects that could be added to the cumulative analysis, Staff's current recommendation for full project mitigation [which our Decision adopts] would not be affected." In effect, then, Mr. Sarvey's data request, and his subsequent Motion to Compel, were moot.

Procedurally, neither the Tesla Committee nor the full Commission expressly ruled on Mr. Sarvey's Motion to Compel. Yet the Committee's decision to go forward with evidentiary hearings, its preparation of the proposed decision, and the adoption of our final Decision can be viewed as a de facto denial of the Motion. If it is necessary to take further action to remove any remaining doubt, we hereby deny the Motion.

2. Air Quality Issues

Before addressing the specific air issues raised in the petitions, we emphasize several basic points. First, because the Project is located in Alameda County, BAAQMD has jurisdiction to determine compliance with applicable air quality laws; BAAQMD found that the Project is in compliance. The SJVAPCD was a party in the proceeding because its rules apply

to Project-related construction activities in San Joaquin County, and because some emissions from the project will travel from the BAAQMD region to the SJVAPCD region. Second, our Decision requires mitigation of air emissions beyond what is required by BAAQMD's rules and what was recommended by SJVAPCD, in order to ensure that mitigation of all potential impacts would be achieved, pursuant to the California Environmental Quality Act ("CEQA"). The petitions do not always make clear whether they are asserting errors with regard to air quality laws or with regard to CEQA. Third, all of the issues raised in the petitions were considered in detail in the existing record and in our Decision.

a. $PM_{2.5}$ Impacts and Mitigation

Both petitions assert that our Decision's mitigation for emissions of particulate matter of 2.5 microns or less ("$PM_{2.5}$") is inadequate. Such emissions have only recently become regulated (as opposed to PM_{10}), and the laws in this area are still being developed: $PM_{2.5}$ nonattainment designations were in the process of being formalized throughout the proceeding (final nonattainment $PM_{2.5}$ designations will not be determined by U.S. EPA until late 2004), and no air district yet has a strategy for $PM_{2.5}$ impacts. (Exhibit 54, p. 2; RT 9/18/03, pp. 206-209; RT 9/18/03, pp. 157-158). In those circumstances, the Staff developed a case-specific mitigation strategy, focusing on ensuring that mitigation for $PM_{2.5}$ emissions would occur primarily during the months when $PM_{2.5}$ concentrations are the most severe. (Exhibit 54, pp. 6-7; Exhibit 124, pp. 4-5; RT 9/18/03, pp. 235-237.). Staff also strengthened the $PM_{2.5}$ mitigation by discounting the Applicant's proposed PM_{10} mitigation by over 85 percent to account for only that portion that would effectively mitigate $PM_{2.5}$. (Decision, pp. 143, 155, 158; Exhibit 51, pp. 41-43; Exhibit 53, p. 3; Exhibit 54, pp. 4-5; RT 9/18/03, p. 244.). The SJVAPCD agreed with the Staff's approach and determined that providing mitigation during the worst months would sufficiently minimize the impacts year-round. (Exhibit 51, pp. 41-45; Exhibit 124, p. 6; RT 9/18/03, pp. 249-250; RT 4/8/04, pp. 265–270.) As a result, the Tesla Decision is our first certification decision with mitigation expressly aimed at $PM_{2.5}$ emissions.

The petitions for reconsideration make much of the fact that both the science and the law on $PM_{2.5}$ emissions is developing. However, they point to no error of fact or law in the Decision. Neither BAAQMD nor SJVAPCD takes issue with our Decision's conservative approach to $PM_{2.5}$ mitigation; we see no reason for change.

CARE's petition also asserts that the Decision errs by not providing a health assessment of $PM_{2.5}$ emissions. CARE is wrong. Air quality laws regulating "criteria pollutants," such as $PM_{2.5}$, are designed to protect public health (indeed, to protect the health of the most sensitive individuals), so compliance with those laws is sufficient to demonstrate that public health is not threatened. In our power plant siting decisions, we also analyze the effects of *non*-criteria pollutants on public health, pursuant to CEQA. However, because $PM_{2.5}$ was analyzed as a criteria pollutant, a separate (and redundant) health analysis was not necessary.

b. 70 Percent Effectiveness of Offsets from Pittsburg and Antioch

Air emissions in excess of applicable legal requirements must be mitigated by obtaining "offsets," or "emission reduction credits" ("ERCs") from other sources of pollution. Offsets obtained from sources relatively far away from a proposed project must be discounted appropriately to account for the fact that such offsets are likely to be less effective than offsets closer to the project site. In the Tesla Decision, we found that mitigation for the transport of certain emissions would be necessary under CEQA, and the Applicant proposed to obtain various ERCs from the Pittsburg and Antioch area (which is in the BAAQMD region). To account for transport effects between that area, the project site, and the SJVAPCD region, we gave credit for only 70 percent of those offsets. (Decision, p. 158.)

The petitions for reconsideration assert that the percentage should be lower. We disagree. Staff proposed, and we accepted, the 70 percent factor based on observations of pollutant levels between the Bay Area (including Pittsburg and Antioch) and the Tesla Project site, and on the topography of the region (like the Tesla Project site, Pittsburg and Antioch are east of the mountains that separate the Bay Area and San Joaquin Valley air basins). (Decision, p. 158, fn. 45; Exhibit 53, p. 2; RT 09/18/03, pp. 245-247.) The petitions correctly state that we rejected a 70 percent factor in the proceeding on the East Altamont Energy Center ("EAEC"), which is located close to the Tesla Project; however, that Decision did not adopt an ERC effectiveness percentage because CEQA mitigation in the form of offsets was not required in that case and so an ERC adjustment (to ensure that mitigation would be adequate) was not necessary. The decision in each proceeding must be based on the best project-specific evidence that is available at the time. We also note that the amount of mitigation we are requiring for the Tesla Project substantially exceeds that required for EAEC. In sum, we stand by our original conclusion that the 70 percent ERC effectiveness ratio in this case is supported by the evidence.

c. BACT for Carbon Monoxide

BAAQMD determined that a carbon monoxide ("CO") emissions level of 4.0 parts per million ("ppm") would satisfy the requirements for Best Available Control Technology "BACT"). (Decision, p. 185, Condition AQ-24(d); Exhibit 23, pp. 12-13.) CARE's petition asserts that BACT is 2.0 ppm, based on a recent determination by the South Coast Air Quality Management District ("SCAQMD") that CO BACT for the Magnolia power plant in Burbank is 2.0 ppm and statements from the U.S. EPA that 2.0 is the Lowest Achievable Emission Rate ("LAER," which is similar to BACT) for CO. Those assertions are not adequate reason to change our Decision. The Commission Staff's Response to Petitions for Reconsideration states that SCAQMD has made CO BACT determinations between 2.0 and 4.0 ppm, including a 4.0 ppm CO limit for the Inland Empire power plant in Riverside County, which came after the Magnolia decision. In addition, it is unclear whether the U.S. EPA determinations are based on facts and circumstances sufficiently similar to those in the Tesla proceeding to make them applicable here. Furthermore, even at a level of 4.0 ppm, the CO emissions from the Tesla Project would cause no potentially significant environmental impacts. (Exhibit 51, p. 4.1-31.) For all these reasons, we decline to second-guess BAAQMD's determination.

d. Control of Ammonia Slip

Our Decision limits ammonia slip emissions to 5.0 ppm. (Decision, p. 166, Finding 16.) CARE's petition contends that the limit should be 2.0 ppm, based on experience in Massachusetts. However, as the Decision states, SCAQMD is the only air district in California that has set BACT for ammonia slip, and it has found that 5.0 ppm is the appropriate level; moreover, it could not be verified that the Tesla Project is technically capable of achieving an ammonia slip level below 5.0 ppm on a continuous, year-round basis. (Decision, p. 144, fn. 31; see also 4/8/04 RT, pp. 155-156, 194-199; Exhibit 51, pp. 4.1-27; Exhibit 128, p. 5.) In the absence of California regulatory action requiring a lower level, and of evidence that there will be any adverse impacts from 5.0 ppm, we decline to change our Decision. We also note that because there are many feedlots and other livestock operations in San Joaquin County, the area is "ammonia rich" (Decision, p. 159, fn. 46; see also Exhibits 108, 119); as a result, the ammonia emissions from the Project are likely to be swamped by the background levels.

3. Land Use Issues

The Williamson Act (Gov't Code, § 51200 et seq.), enables local governments to make contracts with private landowners in order to restrict specific parcels to agricultural or related open space uses. (Decision, p. 376, fn. 125.) Construction at the Tesla Project site would not be consistent with a Williamson Act contract; therefore, the Tesla applicant submitted, and the Alameda County Board of Supervisors approved, the necessary partial cancellation of the contract. (*Id.*, p. 377.)

The petitions for reconsideration assert that the cancellation of the Williamson Act contract is inconsistent with Policy 86 of Alameda County's East County Area Plan ("ECAP"), as modified by the County's Measure D. Yet the petitions contain no discussion of the applicable laws or of the evidence in the record; they contain only a bald assertion of noncompliance. Our Decision contains over three pages of detailed discussion of the intricacies of the ECAP and the Tesla Project's compliance therewith. When we adopted the Tesla Decision, we stated that we have no "good cause to second guess the official action of the County Board of Supervisors in this case" (Decision, p. 382), and the Intervenors have offered nothing to justify a change.

ORDER

The Petitions for Reconsideration filed by CARE and by Robert Sarvey are Denied. Mr. Sarvey's Motion to Compel is also Denied. The June 16, 2004, Decision on the Tesla Power Project stands as adopted.

Dated August 11, 2004, at Sacramento, California.

_____/Original Signed/_____
WILLIAM J. KEESE
Chairman

_____/Original Signed/_____
ARTHUR H. ROSENFELD, Ph.D.
Commissioner

_____/Original Signed/_____
JAMES D. BOYD
Commissioner

_____/Original Signed/_____
JOHN L. GEESMAN
Commissioner

_____/Original Signed/_____
JACKALYNE PFANNENSTIEL
Commissioner